

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

8 KITRICH A. POWELL, )  
9 Petitioner, ) 2:06-cv-01264-KJD-LRL  
10 vs. )  
11 TIMOTHY FILSON,<sup>1</sup> *et al.*, )  
12 Respondents. )  
13 /

15 This capital habeas corpus action was stayed on January 15, 2008, pending the petitioner's  
16 exhaustion of claims in state court. ECF No. 50. On January 9, 2017, petitioner filed a Motion to  
17 Temporarily Lift Stay to Supplement First Amended Petition for Writ of Habeas Corpus. ECF No.  
18 78.

With that motion, petitioner requests that he be granted leave of court to add to his petition a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016). Petitioner filed the proposed additional claim as a supplement to his first amended petition. ECF No. 79. Respondents filed an opposition to petitioner’s motion (ECF No. 81), in response to which petitioner filed a reply (ECF No. 83).

23 Respondents contend that petitioner has mischaracterized the addition of the *Hurst* claim as a

<sup>1</sup> Timothy Filson, current warden of Ely State Prison, is substituted as respondent in place of his predecessor Renee Baker. See Fed. R. Civ. P. 25(d) (providing that a public “officer’s successor is automatically substituted as a party” when his or her predecessor “ceases to hold office while the action is pending”).

1 supplement, rather than as an amendment. *See Fed. R. Civ. P. 15.* For purposes of this motion, the  
 2 distinction is immaterial. A petition for a writ of habeas corpus “may be amended or supplemented  
 3 as provided in the rules of procedure applicable to civil actions.” 28 U.S.C. § 2242; *see also* Rule  
 4 12, Rules Governing Section 2254 Cases (Rules of Civil Procedure apply to federal habeas  
 5 proceedings “to the extent that they are not inconsistent.”). Federal Rule of Civil Procedure 15(a)  
 6 permits a party to amend a pleading with the opposing party’s written consent or the court’s leave.  
 7 See *Fed. R. Civ. P. 15(a)(2)*. “The court should freely give leave when justice so requires.” *Id.*  
 8 “Courts may decline to grant leave to amend only if there is strong evidence of ‘undue delay, bad  
 9 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
 10 amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the  
 11 amendment, [or] futility of amendment, etc.’” *Sonoma County Ass’n of Retired Employees v.*  
 12 *Sonoma County*, 708 F.3d 1109, 1117 (9<sup>th</sup> Cir. 2013) (quoting *Foman v. Davis*, 371 U.S. 178, 182  
 13 (1962)). “[T]he consideration of prejudice to the opposing party carries the greatest weight.”  
 14 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2003).

15 *Hurst* was decided January 12, 2016. Respondents do not show that petitioner’s request to  
 16 add a claim based on *Hurst* within the following year involved undue delay, bad faith, or dilatory  
 17 motive, or that they would be unduly prejudiced by the addition of such claims.

18 Furthermore, while there appear to be serious questions regarding the retroactivity of *Hurst*,  
 19 and its application in this case, the court determines -- for purposes of the motion to supplement only  
 20 -- that there is no showing that addition of the *Hurst* claim would be futile. “[P]roposed amendments  
 21 [are futile when they] are either duplicative of existing claims or patently frivolous.” *Murray v.*  
 22 *Schrivo*, 745 F.3d 984, 1015 (9<sup>th</sup> Cir. 2014) (quoting *Bonin v. Calderon*, 59 F.3d 815, 846 (9<sup>th</sup> Cir.  
 23 1995)).

24 Petitioner requests that the court waive the requirements of LR 15-1, which generally  
 25 requires that a complete proposed amended petition be attached to a motion to amend, and that, after  
 26 a motion to amend is granted, the petitioner is to file the complete amended petition. Under the

1 resources, the court will waive the requirements of Local Rule 15-1. After the completion of his  
2 pending state-court proceedings, and if and when the stay of this action is permanently lifted, the  
3 court will require petitioner to file an amended habeas petition, including the new claim.

4 Nothing in this order, granting petitioner's motion for leave to supplement, will have any  
5 bearing on any other procedural issue in this case; nor will any aspect of this order have any bearing  
6 on the court's consideration of the merits petitioner's new claim in any other context.

7 **IT IS THEREFORE HEREBY ORDERED** that petitioner's Motion to Temporarily Lift  
8 Stay to Supplement First Amended Petition for Writ of Habeas Corpus (ECF No. 78) is  
9 GRANTED.

10 **IT IS FURTHER ORDERED** that petitioner is granted leave of court to add to his habeas  
11 corpus petition in this action the claim set forth in his Supplement to First Amended Petition for  
12 Writ of Habeas Corpus (ECF No. 23). That claim will be considered added to the habeas corpus  
13 petition in this action. The court will not, at this time, require petitioner to file an amended habeas  
14 petition, including his new claim. After completion of his state-court proceedings, and if and when  
15 the stay of this action is permanently lifted, the court will require petitioner to file an amended  
16 habeas petition including this new claim.

17 **IT IS FURTHER ORDERED** that, in all other respects, the stay of this action shall remain  
18 in effect.

19 **IT IS FURTHER ORDERED** that petitioner's motion for extension of time (ECF No. 82) is  
20 GRANTED *nunc pro tunc* as of February 3, 2017.

21 DATED: March 20, 2017

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UNITED STATES DISTRICT JUDGE